Supreme Court, U.S.
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No. 96-292

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARIAN JOHNSON, GORDON HUBBARD, MARGO EDMISTON and H. DEAN SUMMERS,

Petitioners,

v.

KRISTINE L. FANKELL,

Respondent.

On Writ of Certorari to the Supreme Court of the State of Idaho

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does federal law preempt state rules of appellate jurisdiction by requiring state courts adjudicating claims under 42 U.S.C. §1983 to adopt the federal collateral order doctrine and provide for an interlocutory appeal of right from a decision rejecting a claim of qualified immunity, even where state law does not authorize such an appeal?

PARTIES

In addition to the parties set forth in the brief for petitioners, the second amended complaint also named as a defendant Dyke Nally, the Superintendent of the Idaho State Liquor Dispensary, and his successors. Mr. Nally was sued solely in his official capacity for the purpose of obtaining injunctive relief, and thus was not among the petitioners seeking review of the qualified immunity issue raised by the instant petition.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

MARIAN JOHNSON, *et al.*,
Petitioners,

v.

KRISTINE L. FANKELL,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Idaho

BRIEF FOR RESPONDENT

STATUTE AND RULE INVOLVED

Rule 12(a) of the Idaho Appellate Rules provides:

Permission may be granted by the Supreme Court to appeal from an interlocutory order or decree of a district court in a civil or criminal action . . . which is not otherwise appealable under these rules, but which involves a

> controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation.

Section 1291 of 42 U.S.C. provides in pertinent part, "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT OF THE CASE

Statement of the Facts

This action arose out of an employment dispute at a state operated liquor store in a rural area of Idaho. As is true in a number of states, such as New Hampshire, private retailers in Idaho are not permitted to sell liquor, beer or wine for consumption off premises. Rather, such goods are sold only by or under the auspices of the Idaho State Liquor Dispensary, primarily at stores operated by the Dispensary and staffed by government employees. The events at issue in this case occurred at state operated liquor store #322 in Sandpoint, Idaho, a town of 5,300 located eight hours by car north of Boise.

Respondent was a long time employee of the State Liquor Dispensary; she was originally hired on July 10, 1980, and until her dismissal in April 1993 worked primarily in the Sandpoint store. Because of the peculiarities of Idaho law, respondent was designated as a "temporary" state employee for the first twelve years of this period.[1] In December 1991, respondent applied to alter her status to that of a permanent "classified" employee; after passing the applicable Idaho

[1]This classification limited the number of hours a year during which respondent could work to 1,385. Idaho Code §67-5302(31).

Personnel Commission examination, she was hired as a "probationary" classified employee on August 2, 1992. (J.App. 6, 17). This change in status did not affect her actual duties; she continued to work, as she had for years, as a liquor store stock clerk.

Some time after the start of this probationary period, petitioner Marian Johnson, the supervisor of the Sandpoint store, announced her intention to take a leave of absence. Petitioner Johnson sought to appoint as the acting store manager during this period a Mary Stirn, a personal friend of Johnson's. Agency practice, however, limited such appointments to persons who, like respondent, had passed the Idaho Personnel Commission examination. Respondent successfully objected to state officials in Boise that Stirn had never passed the requisite examination. As a result, respondent was appointed as the temporary store manager during Johnson's absence. (J.App. 6-7) Respondent held that position without incident for two months. From the beginning of her employment in 1980 until the spring of 1993, respondent regularly received satisfactory evaluations from her various supervisors.

Petitioner Johnson returned from her leave of absence on March 10, 1993. On March 25, 1993, Johnson prepared a negative written evaluation of respondent's job performance. (J.App. 7). The job evaluation form used required that respondent be given numerical ratings in a number of different areas. Although this new evaluation was lower than in the past, the actual total of the scores which respondent received was 55, which according to the form would have meant that respondent "Meets Expectations" and should "be certified to permanent status." However, petitioner Johnson, inadvertently or otherwise, incorrectly totalled the scores as below 54, and thus classified respondent as "Below Expectations." (J.App. 17, 51). Respondent filed a timely grievance to contest her performance score and evaluation; state officials, however, never responded to or processed the grievance. (J.App. 7, 37, 43-44, 55-56).

On April 7, 1993, petitioner Summers, then the

Personnel Director of the State Liquor Dispensary, notified respondent that she would be dismissed for failure to satisfactorily complete her initial probationary period. Respondent was fired on April 22, 1993. (J.App. 7, 17).

Proceedings Below

On April 11, 1995, respondent commenced this action in the Idaho District Court for Bonner County, pursuant to 42 U.S.C. §1983, seeking injunctive relief, including reinstatement, as well as damages. Damages were sought against four specific state officials, including petitioners Johnson and Summers, allegedly involved in respondent's dismissal. The injunctive relief was sought against a fifth defendant, the then Supervisor of the Liquor Dispensary, Dyke Nally, and his successors.[2] The complaint alleged two distinct violations of the Due Process Clause of the Fourteenth Amendment. First, respondent claimed that she had been deprived without due process of her property interest in her employment.[3] Second, she asserted that she had been denied procedural due process when state officials refused to process her grievance challenging

[2]Nally was added as a defendant in the Second Amended Complaint, in place of the State Liquor Dispensary, which was one of the original named defendants.

[3]Idaho classified probationary employees may only be terminated for failure to satisfactorily complete their entrance probationary period. *See* Idaho Code §67-5309(j). The statute "limits the reasons for which an employee may be discharged," *Mitchell v. Zilog*, 125 Idaho 709, 712, 874 P. 2d 520 (1994), even during the entrance probationary period. "Satisfactory performance" is a legislatively imposed limitation on the state agency's authority to terminate a probationary worker.

the March, 1993, evaluation. (J.App. 7-9)[4].

Petitioners moved to dismiss the complaint on a variety of grounds, asserting, *inter alia*, that the four defendants against whom damages had been sought were entitled to qualified immunity. Petitioners did not deny that the requirements of the Due Process Clause were themselves well established at the time when respondent was dismissed. *See Board of Regents v. Roth*, 408 U.S. 564 (1972). Rather, petitioners asserted that under *state* law at the time of respondent's dismissal it was not clear whether respondent was yet a permanent employee.

At the time of respondent's dismissal, Idaho law provided that a probationary employee would automatically become a permanent employee following "a probation period not to exceed six (6) months" plus thirty days, unless during that period the probationary employee received an unsatisfactory written evaluation. Idaho Code §67-5309(j). Respondent began her probationary period on August 2, 1992; the six month plus thirty day period expired on March 4, 1993, twenty-five days before the adverse evaluation. Petitioners contended, however, that when they dismissed respondent in April 1993 they "reasonably believed" that she had not yet achieved permanent status (J.App. 30), pointing to an Idaho Personnel Commission rule then in effect requiring probationary employees to serve 1040 hours in that status[5]. In the interim, however, the Idaho Supreme Court had declared invalid the rule in question, on the ground that it conflicted with the statutory six month limitation

[4]In *Brigham v. Department of Health and Welfare*, 106 Idaho 347, 679 P.2d 147 (1984), the Idaho Supreme Court had held that "probationary employees are entitled to the full range of procedural rights set forth in the [Personnel Commission] Act." 106 Idaho 350, 679 P. 2d 14. The right to file a grievance is one of the rights provided by the Act.

[5]Respondent had worked for 950.9 hours as of March 13, 1993, the date on which the period covered by her performance evaluation ended. (J. App. 17).

on probationary service.

> It is *not reasonable* . . . for the commission to construe "six months" to mean " . . . 1040 . . . hours of credited state service." . . . [The commission's] construction . . . contradicts the *clear* expression of the legislature. . . . The legislature has *clearly* indicated that the maximum period of probation for "all appointments" is six calendar months.

Hood v. Idaho Department of Health and Welfare, 868 P. 2d 479, 482, 125 Idaho 151 (1994)(Emphasis added).[6]

Petitioners submitted in support of their motion to dismiss a memorandum of counsel asserting that petitioners had acted "in reliance of [sic] Personnel Commission rules", citing the rule held invalid in *Hood*.[7] The single affidavit supporting that motion, however, contained no assertion that any such reliance had occurred; petitioners offered no affidavit or other evidence suggesting that at the time of the dismissal the petitioners actually knew that respondent had fewer than 1040 hours of probationary service when she received her adverse evaluation. In this Court, petitioners assert only that in the court below they "*argued* that they had reasonably relied upon the administrative rule" (P.Br. 6)(emphasis added), not that they ever adduced in that court any evidence in support of that argument.

On February 22, 1996, the Idaho District Court, treating the motion to dismiss as a motion for summary judgment,

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[6]The relevant state law was amended several months later to replace the six month rule with a 1040 hour rule.

[7]J.App. 30 (citing IDAPA 28.15.A.2.a).

denied the motion.[8] Petitioners then sought to take an interlocutory appeal limited to that portion of the order rejecting the qualified immunity claim. On April 23, 1996, the Idaho Supreme Court dismissed the appeal under Idaho Appellate Rule 11, "for the reason [that] it is not from a final order or judgment". (Pet. App. 1a). On May 23, 1996, that court denied petitioners' petition for rehearing. (Pet. App. 3a).

Defense Counsel have not sought to appeal with regard to respondent's claim for injunctive relief; that aspect of the litigation has been stayed by agreement of the parties. The factual issues which would be litigated regarding the monetary and injunctive claims are essentially the same. Thus petitioners, as the principal participants in the decision to dismiss respondent, will face discovery and the necessity of testifying at the trial of the equitable claim regardless of whether their qualified immunity defense is sustained prior to trial.

SUMMARY OF ARGUMENT

The right to take an interlocutory appeal recognized by *Mitchell v. Forsyth*, 472 U.S. 511 (1985), is not a requirement contained in section 1983, but an interpretation of the provisions of 28 U.S.C. §1291 regarding when a decision is "final." The specific result in *Mitchell* is an application of the federal collateral order doctrine, a gloss on section 1291 derived from this Court's decision in *Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541 (1949).

That section 1983 itself contains no right to an interlocutory appeal whenever a qualified immunity defense has been rejected is demonstrated by *Johnson v. Jones*, 115 S.Ct.

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[8]The District Court granted the motion insofar as it sought dismissal of the claims against the Idaho State Liquor Dispensary. (J.App. 63). Defendant Nally was subsequently substituted as a defendant by agreement of the parties.

2151 (1995). *Johnson* refused to permit such an interlocutory appeal where the proffered qualified immunity defense had been rejected because of the existence of genuine issues of material fact, even though the defendants in *Johnson* would as a result have to take part in discovery and trial. The distinction between the results in *Mitchell* and *Johnson* derives from the nature of the collateral order doctrine applied in both.

Idaho, like many states, does not interpret its state procedural provisions to include a collateral order doctrine. That is due, at least in part, to the fact that the relevant Idaho and federal provisions contain different language. Section 1291 authorizes appeals of "final decisions"; Idaho Appellate Rule 11(a)(1), on the other hand, is limited to "[j]udgments, orders and decrees which are final." The decision of the Idaho Supreme Court interpreting Idaho Appellate Rule 11(a)(1) is binding on the federal courts.

The states may apply such neutral procedural provisions in adjudicating federal causes of action brought in state courts. "The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 372 (1990). Laws which determine the allocation of responsibilities between trial and appellate judges are procedural in nature. *Gasperini v. Center for the Humanities, Inc.*, 116 S.Ct. 2211 (1996). Idaho Appellate Rule 11 does not discriminate against federal claims or federal litigants.

"This is a case about federalism." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). The interests protected by the qualified immunity doctrine are state interests. In structuring its judicial system, Idaho has chosen to give paramount consideration to the state's interest in avoiding the inconvenience and costs inherent in interlocutory appeals. That interest is particularly great because any interlocutory appeal in cases such as this would have to be heard by the Idaho Supreme Court, since Idaho has no intermediate appellate courts between the state District Court in which this case was filed and the state

Supreme Court.

ARGUMENT

I. INTRODUCTION

Idaho courts entertain federal claims under 42 U.S.C. § 1983, and apply federal substantive law in adjudicating such claims, including the federal law concerning qualified immunity defenses. Idaho, however, like every state court, limits appeals of interlocutory rulings, and Idaho's limitations on interlocutory appeals are not identical to the provisions governing federal appeals. Like several other states, Idaho law does not permit immediate appeals of right from rulings denying qualified immunity claims, although Idaho does allow permissive appeals from such rulings. The central issue presented by this action is whether the federal civil rights laws, despite state laws to the contrary, require the Idaho Supreme Court to hear an interlocutory appeal as of right regarding qualified immunity whenever a federal circuit court would hear such an appeal.

Although the cases in which interlocutory qualified immunity appeals would in practice be allowed under federal and Idaho procedure do overlap to a substantial degree, some interlocutory appeals permitted in the federal courts would not be possible in the Idaho courts, while some appeals possible under the Idaho Appellate Rules could not occur in the federal system. First, applying the collateral order doctrine of *Cohen*, the federal courts interpret 28 U.S.C. §1291 ordinarily to permit appeal of the pre-trial rejection of a qualified immunity defense, provided the appeal is limited to the question of "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). Idaho, like many of the states, has not adopted a collateral order doctrine exception to its ban on interlocutory appeals, set out in Idaho Appellate Rule 11; accordingly the appeal of right available in

federal court under 28 U.S.C. §1291 does not exist in the Idaho courts.

Second, Idaho Appellate Rule 12(a) authorizes the Idaho Supreme Court to grant a permissive appeal

> from an interlocutory order . . . of a district court . . . which is not otherwise appealable under these rules but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the order resolution of the litigation.

Rule 12 is sufficiently broad to encompass the appeals permitted under *Mitchell*, since those federal appeals are limited to questions of law. Provisions such as these regarding appeals of controlling legal issues, then Judge Scalia once observed, are "particularly appropriate when claims of immunity are at issue." *McSurely v. McClellan*, 697 F. 2d 309, 317 n. 12 (D.C.Cir. 1982)(Per curiam opinion of Wald, J. and Scalia, J.). Rule 12(a) is more liberal than the analogous federal provision, 28 U.S.C. §1292(b), because a Rule 12(b) appeal can be authorized without the concurrence of the trial court.[9] Thus any defendant whose proffered qualified immunity defense turns on a question of law has a right to have his or her request for review considered by the Idaho Supreme Court.[10]

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[9]The difference is of considerable importance. In *Mitchell v. Forsyth* the district judge had refused to certify for appeal under §1292(b) his rejection of Mitchell's qualified immunity defense. Brief for Petitioner, *Mitchell v. Forsyth*, No. 84-335, pp. 23-24.

[10]Under Rule 12 an appeal is not possible if there are not "substantial grounds" in support of the appellant's position; a federal appellate court would proceed somewhat differently in dealing with an insubstantial appeal, assuming jurisdiction over the appeal but often then summarily dismissing or affirming it. *Behrens v. Pelletier*, 116 S.Ct. 834, 841

Third, in at least one circumstance Idaho law provides a right of interlocutory appeal regarding qualified immunity where federal law would not. If, following a jury verdict in favor of a defendant regarding a fact-based qualified immunity defense, the trial court were to grant the plaintiff a new trial, that order would not be appealable in the federal system, *Allied Chem. Corp. v. Daiflon*, 449 U.S. 33, 34 (1980); Idaho Appellate Rule 11(a)(5), on the other hand, authorizes an interlocutory appeal as of right from any "order granting . . . a new trial." Thus Idaho law in some instances accords to section 1983 defendants a protection unavailable in federal court, the risk of having to go through *two* trials.

In sum, it is not the case either that Idaho forbids all interlocutory appeals regarding a qualified immunity defense, or even--had petitioners chosen to proceed under Rule 12--that petitioners necessarily could not have taken an appeal in the instant case. Taken as a whole the Idaho process and standards for interlocutory appeals regarding qualified immunity, while arguably less favorable for some section 1983 defendants, are undoubtedly equally or more favorable for other section 1983 defendants; at another point in the instant litigation those differences could conceivably work to the benefit of the instant petitioners. The issue in this case is thus *not* whether Idaho could forbid all appeals, or all interlocutory appeals, regarding qualified immunity, but whether the particular contours of Idaho procedure regarding such appeals must mirror precisely the

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(1996). This difference in procedure, however, is fairly nominal, since the state court appellant is permitted to submit a brief arguing that its appeal raises a substantial issue (Idaho Appellate Handbook, section 9.4.5.4(1996)), while a federal appellant need not be allowed to present argument prior to the summary dismissal or affirmance of its appeal. This difference may at times inure to the benefit of the state-court defendant-appellant, since the unexplained rejection of a Rule 12 appeal would not have the law-of-the-case preclusive effect of the summary disposition of a federal appeal.

specific practice that would be followed in federal court.

II. FEDERAL LAW DOES NOT PREEMPT NEUTRAL STATE RULES OF APPELLATE PROCEDURE WHERE STATE COURTS EXERCISE JURISDICTION OVER SUITS AGAINST STATE OFFICIALS UNDER SECTION 1983

(1) The appeal presented here was dismissed by the Idaho Supreme Court pursuant to neutral rules of appellate jurisdiction under which Idaho has provided only for permissive appeals, but not appeals as of right, for such interlocutory decisions. It is well established that federal causes of action, including section 1983, do not override such state procedural rules. "The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 372 (1990). "[A]bsent specific direction from Congress the state courts have always been permitted to apply their own reasonable procedures when enforcing federal rights." *Southland Corp v. Keating*, 465 U.S. 1, 31 (1984)(O'Connor, J., dissenting). "The States thus have great latitude to establish the structure and jurisdiction of their own courts" and "may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law" *Howlett v. Rose*, 496 U.S. at 372 (citations omitted). As the Idaho Attorney General observed in an earlier brief in this Court, "sovereign states . . . have an interest in allocating their judicial resources, and in controlling the conditions under which their courts can be used, to the fullest extent consistent with the Constitution."[11] .

This Court has repeatedly held that a state may apply such neutral state procedural rules even when they have the

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[11]Brief Amicus Curiae of the States of California, et al., *Felder v. Casey*, No. 87-526, p. 1.

effect of precluding a federal claimant from suing in state court at all, so long as the state rule is a neutral standard not inconsistent with federal law. *Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950)(state forum non conveniens law); *Herb v. Pitcairn*, 324 U.S. 117 (1945)(state venue law): *Douglas v New Haven R. Co.*, 279 U.S. 377 (1929)(facially neutral statute baring suits by non-residents against corporations not doing business in the state). A fortiori a state may apply a neutral procedural rule where, as here, that rule does not alter at all the ultimate outcome of a section 1983 proceeding, but merely affects the order in which the issues presented will be resolved.

There are countless differences between federal procedure and the procedural rules and statutes of each of the fifty states. Neither the requirement that state courts of competent jurisdiction must entertain certain federal causes of action, nor the voluntary exercise of state court jurisdiction over federal claims that may be filed in state court, ordinarily imposes on the state judiciary an obligation to follow the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, or the procedural provisions in Title 28 of the United States Code. The exercise of state jurisdiction over a federal cause of action emphatically does not mean "that for the purpose of enforcing the [federal] right the state court [is] to be treated as a Federal court deriving its authority not from the State creating it, but from the United States." *Howlett v. Rose*, 496 U.S. at 371 n. 17; *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 222 (1916)

The specific circumstances of this case illustrate in a particularly pointed manner the complex problems that would arise if section 1983 interlocutory appeals in state court were governed by federal rather than state procedures. Federal law provides not only the starting point at which a federal appeal can be taken--after the denial of a qualified immunity defense based solely on an issue of law--but also the cut off point. Had the motion to dismiss at issue in the case in fact been filed in federal rather than court, petitioners would have had 30 days

from the denial of that motion to file a notice of appeal. Fed. Rules of App. Pro., Rule 4(a)(1). Under Idaho Procedure, on the other hand, appeals can be filed up to 42 days after the entry of an appealable order. Idaho Appellate Rule 14(a). In the instant case, the order denying the motion to dismiss was entered on February 23, 1996, and petitioners filed their notice of appeal on April 4, 1996, some 41 days later. Thus petitioners can prevail only if federal law controls when the time for taking an appeal commences, but state law determines the point at which that period ends.

Few procedural issues are of greater practical importance to the structure of a state's judicial system, or more related to local circumstance and practice, than the issue of when litigants can take appeals. A state's rules defining when a judgment is final for purpose of appeal and whether and how appeals from interlocutory rulings will be entertained go to the heart of the state's sovereign power to control the operation of its courts. "[The] right of review in the appellate court is purely a matter of state concern," *Kohl v. Lehlback*, 160 U.S. 293, 299 (1895); "whether an appeal should be allowed, and if so, under what circumstances, are matters for each state to determine for itself." *McKane v. Durston*, 153 U.S. 684, 688 (1894). Congress has never enacted a statute expressly dictating that state courts must alter their rules of appellate jurisdiction when federal claims are at issue, and this Court has never found that federal law tacitly overrides state rules governing the timing of appellate review.

The general prohibition against interlocutory appeals embodied in Idaho Appellate Rule 11, and applied by the Idaho Supreme Court in this case, is not some recent Idaho innovation, but a virtually universal procedural rule well known to the Congress which adopted section 1983. "[T]he final judgment rule is the dominant rule," *DiBella v. United States*, 369 U.S. 121, 126 (1962), reflecting a "deeply-held distaste for piecemeal litigation." *Richardson-Merrell, Inc., v. Koller*, 472

U.S. 424, 440 (1989).[12] The rule against interlocutory appeals dates from Roman times[13], and was well established both in England[14] and in early federal practice, when appeals were limited to "final judgments" and "final decrees."[15] Idaho, like virtually every state in the union[16], does not ordinarily permit appeals of the myriad intermediate rulings that may lead up to the final resolution of a civil or criminal case. As this Court recognized in *Johnson v. Jones*, 115 S.Ct. 2151 (1995):

> [R]ules that permit too many interlocutory appeals can cause harm. An interlocutory

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[12]*Cobbledick v. United States*, 309 U.S. 323, 325 (1940)("Finality as a condition of review is an historic characteristic of federal appellate review").

[13]Crick, "The Final Judgment as a Basis for Appeal", 41 Yale L.J. 539, 540-41 (1932).

[14]*McLish v. Roff*, 141 U.S. 661, 665 (1891)(in limiting appeals to final judgments the 1789 Judiciary Act only declared "a well settled and ancient rule of English practice.")

[15]1 Stat. at Large 83, 84, 85, §§21, 22, 25. In 1830, commenting favorably on this limitation in the Judiciary Act, Justice Story observed:

> "It is of great importance to the due administration of justice and is in the furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon *final* judgments only, that causes should not come up here in fragments, upon successive appeals. It would occasion very great delays, and oppressive expenses."

Canter Admx. v. Amer. Inc. Co., 3 Pet (28 U.S.) 307, 318 (1830)(emphasis in original).

[16]The sole exception appears to be New York. *See* N.Y.Code Civil Practice Law and Rules §5701; Scheffel, "Interlocutory Appeals in New York--Time Has Come for a More Efficient Approach" 16 Pace L.Rev. 607 (1996).

> appeal can make it more difficult for trial judges to do their basic job--supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial court simply proceeded, would have turned out to be unnecessary.

115 S. Ct. at 2154. Idaho's restrictions on interlocutory appeals reflect similar concerns:

> [I]n a proper system of appeals . . . to permit an appeal from all intermediate orders and decisions of the district courts would result in such vexatious and intolerable confusion and delay as to render impossible an orderly and expeditious administration of justice by the courts of the state.

State ex rel. State Bd. of Medicine v. Smith, 80 Idaho 267, 269, 328 P. 2d 581, 582 (1958).

A state's interest in limiting interlocutory appeals is particularly great where, as here, the procedure in question concerns the mandatory jurisdiction of the state's highest court. Idaho, like other small states, has no intermediate appellate courts.[17] Any *right* to take an interlocutory appeal would impose a burden directly on the Idaho Supreme Court, necessarily interfering with its ability to meet its far more pressing responsibilities within the state judicial system. Requiring all five justices of the Idaho Supreme Court to hear a case would impose a greater practical burden than the federal

[17]The Idaho District Courts, in which the instant action was filed, do function as intermediate appellate courts hearing appeals from the state's Magistrate Courts.

procedure under *Mitchell*, which requires that appeals be heard by three of the twenty-eight Ninth Circuit judges.[18] At present Idaho Appellate Rule 12 gives the Idaho Supreme Court a degree of control over interlocutory appeals on its docket. Application of *Mitchell v. Forsyth* to state section 1983 actions could well burden the Idaho Supreme Court with a substantial number of such appeals, quite possibly with several such interlocutory appeals as of right in the same case. *Behrens v. Pelletier*, 116 S.Ct. 834 (1996). A federal statute granting federal section 1983 defendants an absolute right to appeal to *this* Court denials of qualified immunity, abolishing the discretion that now exists to deny certiorari in such cases, would wreak havoc on this Court's workload; no similar burden should lightly be imposed on the Idaho Supreme Court. The ability of a state to control the use of its judicial resources would be undermined if the federal courts were to permit state court litigants raising federal claims to disregard neutral state law rules regarding state appeals. *Coleman v. Thompson*, 501 U.S. 722 (1991) .

(2) In *Felder v. Casey*, 487 U.S. 131 (1988), this Court indicated that the principles of *Erie R. Co. v. Thompkins*, 304 U.S. 64 (1938), and its progeny were useful in identifying those essentially procedural state laws that could, consistent with the Supremacy Clause, be applied in state court to federal claims. 487 U.S. at 151; see *Brown v. Western Railway of Alabama*, 338 U.S. 284, 296 n. 1 (1949). The function of a state law regarding interlocutory appeals is to allocate among the state's judges the authority to decide a particular issue prior to the entry of final judgment. A state's rules regarding when interlocutory appeals are permitted or prohibited thus "rests on

[18]The potential burden on the Idaho Supreme Court is all the greater because under Idaho law, unlike the federal system, once one party is permitted to take an interlocutory appeal, the opposing party may then take a cross-appeal of any other interlocutory decision in the case. Idaho Appellate Rules 11(f), 12(d).

consideration of the efficient ordering of relationships between appellate and trial courts." 15A Wright, Miller and Cooper, Federal Practice and Procedure, §3905, p. 239 (1992). Where a right to an interlocutory appeal exists, the litigants can obtain a decision on that issue from at least one level of appellate judges; in the absence of such an interlocutory appeal, the trial court judge will ordinarily be the judge who will resolve this issue prior to a decision on the merits. Such an allocation of authority as between the trial judges and the appellate judges in a legal system is a quintessential procedural matter under *Erie*. *Gasperini v. Center for the Humanities, Inc.*, 116 S.Ct. 2211, 2222, 2224 (1996).

Petitioners suggest that the absence of an interlocutory appeal as of right is "outcome determinative." (Pet. Br. 23, 25, 27-28) The "outcome determinative" factor referred to in *Felder v. Casey* is the standard applied under *Erie*. *See Felder v. Casey*, 487 U.S. at 151, *quoting Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). Under *Erie* and *Guaranty Trust* "outcome determinative" has always been understood to refer to which party would prevail on the merits, or what remedy would ultimately be awarded. *See e.g.*, *Guaranty Trust Co. v. New York* (state statute of limitations barring litigation of claim at issue)[19]. The term "outcome" by definition refers to where the parties will stand at the *end* of the litigation process.[20]

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[19]*Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980)(statute of limitations bar); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949)(statute of limitations bar); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949)(action barred in state court because plaintiff corporation had not qualified to do business in the state.)

[20]E.g. Webster's College Dictionary, p. 959 (defining "outcome" as "a final product or end result")(1991).

In *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), this Court held that under *Erie* a federal court could order a physical examination of a plaintiff, even though such a compulsory examination would not have been allowed had the action been litigated in state court. The Court rejected an argument that ordering such an examination abridged or enlarged substantive rights, explaining that it was a rule which "really regulates procedure--the judicial process for enforcing rights and duties." 312 U.S. at 14.

The state laws at issue in *Felder*, *Howlett*, and *Burnett v. Grattan*, 468 U.S. 42 (1984), were outcome determinative because, had the state statutes there at issue been applied, the plaintiffs' state court section 1983 actions would have been dismissed. In the instant case, on the other hand, application of Rule 11 will not affect in any way whether respondent will ultimately recover the monetary relief sought in her complaint.

Petitioners argue that, in the absence of a right to take in state court an interlocutory appeal regarding qualified immunity, section 1983 defendants will remove those proceedings to federal court. Petitioners do not point, however, to any evidence of an actual tidal wave of section 1983 removals in the states that have barred such interlocutory appeals as of right since the late 1980's.[21] This argument, moreover, misapprehends the significance of the federal removal statute. In enacting 28 U.S.C. §1441, Congress did not intend to create a problem--risk of removal--which the courts would then solve by federalizing state procedure, but instead sought to provide a remedy for a defendant which concluded that a plaintiff's choice of a state forum had put it at an unfair disadvantage. Federal law does not seek to require that state courts adjudicating federal causes of action follow federal procedure whenever it diverges from state practice. Rather, federal law recognizes that "[s]ome differences in remedy

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[21]*Pizzato's, Inc. v. City of Berwyn*, 169 Ill. App. 3d 796, 798, 523 N.E. 2d 51, 53 (Ill. Ct. App. 1988), *appeal denied*, 122 Ill. 2d 593, 530 N.E. 2d 263 (1988), *cert. denied sub nom. City of Berwyn v. Pizzato's Inc.*, 489 U.S. 1054 (1989); *Ohio Civil Service Employees Association v. Moritz*, 39 Ohio App. 3d 132, 529 N.E. 2d 1290 (Ct. App. 1987).

and procedure are inescapable if the different governments are to retain a measure of independence in deciding how justice should be administered." Hart, "The Relations Between State and Federal Law", 54 Colum. L. Rev. 489, 508(1954). Removal is the manner in which Congress has chosen to address those differences between state and federal procedures.

"Litigants who choose to bring their civil rights actions in state courts presumably do so in order to obtain the benefit of certain procedural advantages in those courts . . . ." *Felder v. Casey*, 487 U.S. at 150.[22] If the Supremacy Clause required elimination of any aspect of state procedure favorable to a federal claimant, and thus any potential incentive for removal, all of the state "procedural advantages" which might attract federal claimants to state court would have to be invalidated. Any number of aspects of state procedure might well matter far more to a defendant than the lack of an interlocutory appeal regarding a qualified immunity motion a defendant might not expect to make, or was confident of winning at the trial court level. Under petitioners' approach, virtually every aspect of state procedure would be at risk, and the state procedures that would have to be supplanted by federal procedure would undoubtedly vary from case to case. At the same time, on the other hand, any alteration of state procedure designed to eliminate procedures favorable to plaintiffs could well have the effect of inducing plaintiffs not to file in state court in the

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[22]*Felder v Casey*, 487 U.S. at 163(O'Connor, J., dissenting)("A plaintiff who chooses to bring a §1983 action in state court necessarily rejects the federal courts that Congress has provided. Virtually the only conceivable reason for doing so is to benefit from procedural advantages available exclusively in state court"); *St. Louis, B. & M. Ry. v. Taylor*, 266 U.S. 200, 208 (1924)("the plaintiff . . . is entitled to whatever remedial advantage inheres in the particular forum.")

first place, particularly if those state procedures which happened to favor defendants were left unaltered. Only an exact replication of federal procedure in state court would eliminate incentives for one party or the other to prefer federal court. Such an effort would ultimately be doomed to failure because of differences between the federal and state judicial systems that could not be eliminated, such as the identities of the judges who sit in each.

Even with regard to appeals regarding qualified immunity, the task of replicating in state court the procedures followed in federal court could be a daunting one. As this Court's decisions in *Johnson* and *Behrens* well illustrate, the decision in *Mitchell* has spawned a series of emerging subsidiary legal issues regarding appealability.[23] Pending resolution of any of these issues by this Court, the state courts would be forced to decide what combinations of federal district court and appellate decisions on an issue were sufficient under the Supremacy Clause to require state courts to adhere to that line of decisions. In the instant case, for example, it is far from clear that the collateral order doctrine applied in *Mitchell v. Forsyth* would apply, since here--unlike the usual qualified immunity case--the plaintiff has asserted a claim for injunctive relief, relying on the same factual allegations underlying her damage claim. Thus regardless of how the qualified immunity issue is resolved, petitioners will still face discovery and the practical necessity of testifying at

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[23]See, e.g., 15A Wright, Miller and Cooper, Federal Practice and Procedure, §3911, pp. 359-60 (does failure to take an appeal permitted by the collateral order doctrine bar appeal of the same issue following final judgement?), 362-65 (does the taking of an appeal under the collateral order doctrine bar continued proceedings in the district court?), 392-95 (to what degree may issues not otherwise appealable be considered on appeal because related to the issue appealable under the collateral order doctrine?).

any trial. Here, unlike *Mitchell*, an interlocutory appeal will have little practical effect on any trial burdens facing the appellants, but will only address what type of remedy respondent can win if she should ultimately prevail in the merits[24]. It is difficult to see how the collateral order doctrine applies in such a situation.

(3) Petitioners' principal argument is that in cases brought under section 1983 Idaho must interpret the term "final" in Idaho Appellate Rule 11 to conform to the federal interpretation of the term "final" in section 1291. (Pet. Br. 15-20). The federal courts have construed the phrase "final decision" in 28 U.S.C. § 1291, to encompass certain interlocutory rulings rejecting qualified immunity claims. According to petitioner, because of these decisions, the Idaho Supreme Court is obligated to construe Idaho Appellate Rule 11(a), despite its different terminology, "to apply the federal definition of finality and accept the appeal because it meets the federal definition of a final order or decree." (Pet. Br. 19). Under petitioners' theory, Idaho's jurisdictional rules would have to be given two different meanings, depending on whether federal or state claims were involved.

This unusual claim is clearly wrong. Federal interpretations of federal statutes do not control the interpretation of state statutes or rules. To the contrary, this Court has recognized that on issues of state law the interpretation of a state's highest court is controlling--even in federal court and even where federal claims are affected. *Commissioner of Internal Revenue v. Bosch*, 387 U.S. 456, 465 (1967). Moreover, states are not compelled to construe

[24]Petitioners' argument rests heavily on their asserted desire to avoid discovery and testifying at trial. (Pet. Br. 8, 9, 10, 12, 14, 15, 17, 25, 26). As a practical matter, however, even a successful appeal of the rejection of their qualified immunity defense would do little to alter those burdens.

state rules of appellate jurisdiction to conform to federal views on finality. The Idaho courts have determined that Rule 11(a)(1)'s provision for appeals from "[j]udgments, orders and decrees which are final," does not include interlocutory rulings on immunity defenses, but limits appeals to judgments that end the litigation. *See Idah-Best, Inc. v. First Security Bank of Idaho*, 99 Idaho 517, 584 P.2d 1242, 1244 (1978). This determination is conclusive and binding on both state and federal courts.

Even if the terminology of the federal statute and the state rule governing appeals of right were identical, the Idaho Supreme Court would be entitled to follow its own construction of the state rule. In fact, however, the language of the federal and state rule are different. Federal law provides for appeals from "final decisions." 28 U.S.C. § 1291. Idaho law provides for appeals of right from "[j]udgments, orders and decrees which are final." Idaho Appellate Rule 11(a). Petitioners assert that the state "must accept the federal definition of finality" (Pet. Br. 15), but although the adjective "final" appears in both Rule 11(a)(1) and section 1291, it modifies different nouns.[25]

III. APPLICATION IN THIS CASE OF IDAHO APPELLATE RULE 11 NEITHER CONFLICTS WITH NOR DISCRIMINATES AGAINST FEDERAL LAW

(1) Petitioners contend that the application in this case of Idaho Appellate Rule 11 is inconsistent with the Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). This

[25]Petitioners assertion that the Idaho Supreme Court must accept "the federal definition of a final order or decree" (Pet. Br. 19) ignores the fact that what this Court's decisions actually define is the phrase "final decision."

argument misapprehends the rationale and holding of that case.

The appealability within the federal judicial system of a qualified immunity defense is governed, not by the particular substantive provisions of section 1983, but by the general procedural statutes regulating civil appeals. *Mitchell* itself was avowedly an application of 28 U.S.C. §1291, which authorizes appeals to the circuit courts of "final decisions" of district courts. The central premise from which *Mitchell's* analysis proceeded was that

> [a]lthough 28 U.S.C. §1291 vests the courts of appeals with jurisdiction over appeals only from "final decisions" of the district courts, "a decision 'final' within the meaning of §1291 does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964)

472 U.S. at 524. The actual holding in *Mitchell* was expressly framed as an interpretation and application of section 1291:

> [W]e hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. §1291, notwithstanding the absence of a final judgment.

472 U.S. at 530. The wording of section 1291 is of controlling importance; if, for example, section 1291 permitted appeals only of final "judgments" or "decrees", as was true under the original Judiciary Act, there would be no right in federal court to take an interlocutory appeal of any qualified immunity decision, regardless of section 1983.

In concluding in *Mitchell* that certain denials of qualified immunity constitute "final decisions" within the

meaning of section 1291, this Court applied the collateral order doctrine set out in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny. The collateral order doctrine, however, is not a facet of section 1983 jurisprudence; neither *Cohen* nor the numerous collateral order decisions of this Court prior to *Mitchell* had arisen under the federal civil rights laws.[26] For example, stressing that section 1291 controls the appealability of issues "in both civil and criminal cases," this Court relied on this line of section 1291 jurisprudence to hold that the denial of a double jeopardy defense is a "final decision" subject to immediate appeal, despite the fact that there was no constitutional right to such an appeal.

> The right of appeal, as we presently know it in criminal cases, is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute--in this case, 28 U.S.C. §1291. . . . We . . . hold that pretrial orders rejecting claims of former jeopardy, such as that presently before us, constitute "final decisions" and thus satisfy the jurisdictional prerequisites of §1291.

Abney v. United States, 431 U.S. 651, 656-62 (1977).

Cohen announced a three part test for determining whether a decision fell within the scope of the collateral order doctrine; the application of that doctrine in any particular case therefore requires a court to determine the

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[26]*Cohen* was a stockholders' derivative action. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983)(action under United States Arbitration Act); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1973)(anti-trust and securities action); *Swift & Company Packers v. Compania Colmbiana Del Caribe*, 339 U.S. 684 (1950)(admiralty).

nature of the issue which a party seeks to appeal. Accordingly, this Court in *Mitchell* evaluated the factors identified as controlling by *Cohen*: the nature of the qualified immunity issue which Mitchell sought to appeal, 472 U.S. 525-27, the conclusiveness of the order appealed from, 472 U.S. at 527, and whether the issues raised by that appeal were separable from the merits of the underlying controversy. 472 U.S. at 527-28. But that analysis of the *Cohen* factors no more meant that the right of appeal in *Mitchell* was required by section 1983 itself than the similar analysis in *Abney* meant that the Double Jeopardy Clause by itself required the federal (or state) courts to entertain an interlocutory appeal whenever a double jeopardy defense was denied. To the contrary, *Abney* emphasized that "there is no constitutional right to appeal"--interlocutory or otherwise--an order denying a double jeopardy defense. 431 U.S. at 656. Indeed, *Abney* noted that appeals as of right did not exist at all for federal criminal defendants until 1889 or later. 431 U.S. at 656 n. 3.

Petitioners argue that, if they are unable to take an immediate interlocutory appeal, they will be forced to face discovery and trial even though an appellate court may later hold that that rejection of their qualified immunity defense was error. But in *Johnson v. Jones*, 115 S.Ct. 2151 (1995), this Court expressly rejected that argument that avoiding the risk of unwarranted trial court proceedings was sufficient by itself to require an interlocutory appeal. *Johnson* held that, despite the existence of that very risk, a defendant in federal court cannot appeal the denial of a qualified immunity defense insofar as it is based on a determination that there is a genuine issue of fact to be tried.

> We recognize that . . . a determination about "genuine" issues of fact for trial . . . still forces public officials to trial. See Brief for Petitioners 11-16. And to that extent, it threatens to undercut the very policy (protecting public officials from lawsuits) that (the *Mitchell* Court held) militates in favor of immediate appeals. Nonetheless, the countervailing considerations that we have mentioned (precedent, fidelity to statute, and underlying policies) are too strong to permit the extension of *Mitchell* to encompass appeals from orders of the sort before us.

115 S.Ct. at 2158. The statute to which fidelity was owed in *Johnson* was section 1291, not section 1983, and the "underlying policies" invoked were "the competing considerations that underlie questions of finality." 115 S. Ct. at 2157.

Even where a purely legal issue is presented, the right of appeal under section 1291 recognized in *Mitchell* does not include a right to insist that *this* Court hear such an interlocutory appeal. Thus while a federal circuit court must hear, prior to trial, a qualified immunity appeal raising such a legal issue, neither this Court nor an en banc circuit court are obligated to do so. Even federal procedure therefore does not guarantee that prior to discovery and trial there will be a definitive determination of the legal issues regarding qualified immunity.

(2) Idaho Appellate Rule 11, to be sure, is different than section 1291. Although the collateral order doctrine is a well established gloss on section 1291, Idaho has not construed Rule 11 to encompass such appeals. That difference, however, is entirely unremarkable. The very wording of Rule 11 is different than section 1291, referring to "[j]udgments, orders and decrees which are final," rather

than to "final decisions."[27] Idaho caselaw has historically emphasized the distinction between "decisions" and "judgments" when addressing issues of appealability.[28] Under Idaho law, a ruling is appealable as a final judgment, order or decree only if it ends the suit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. *Idah-Best, Inc. v. First Security Bank of Idaho*, 99 Idaho 517, 584 P. 2d 1242, 1244 (1978).

Idaho is hardly unique in choosing to interpret its laws not to encompass the collateral order doctrine in *Cohen*. A substantial number of states have expressly declined to construe their state statutes or rules to encompass a collateral order exception to the usual requirement of a final judgment.[29] Other states have chosen to apply some type of

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[27]Petitioners acknowledge that in *Cohen* "[t]his Court has construed 'final decision' to be more encompassing than 'final judgment.'"(Pet. Br. 13 n. 7).

[28] *See Farmers Equipment Co. v. Clinger*, 70 Idaho 501, 222 P. 2d 1077, 1078 (1950)(memorandum decision is not a judgment from which an appeal can be taken); *Blaine County Inv. Co. v. Mays*, 52 Idaho 381, 15 P. 2d 734, 735 (1932)("decision" by trial court is not the same as a "judgment").

[29]Alabama: *Ex Parte Franklin County Dept. of Human Resources*, 674 So. 2d 1277, 1279-80 (Ala. 1996)(collateral order doctrine unnecessary since defendants asserting qualified immunity have "an adequate remedy" under state law similar to 28 U.S.C. §1292(b)); Alaska: *Kerttula v. Abood*, 686 P. 2d 1197, 1201 (Alaska 1984)(rejecting collateral order doctrine because the "considerations underlying the federal exceptions are adequately met by" state law similar to 28 U.S.C. §1292(b));Arkansas: *Herron . v. Jones*, 637 S.W.2d 569, 571, 276 Ark. 493, 496 (1982)(rejecting collateral order doctrine because it "has been a prolific source of uncertainty"); Illinois: *Pizzato's Inc. v. City of Berwyn*, *supra*, 168 Ill. App. 3d at 798, 523 N.E. 2d at 53 ("[r]egardless of how well

collateral order doctrine, but in many instances the state version of that doctrine is clearly narrower[30] or broader[31]

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reasoned the 'collateral order' doctrine may be, it cannot be used to confer jurisdiction upon this court where none exists under Illinois law"); Missouri: *State v. Michaels*, 682 S.W. 2d 162, 163 (Mo. 1984)(collateral order doctrine not consistent with state statutes which only permit appeals from "final judgments"); Nevada: *State v. Greenspun*, 109 Nev. 1022, 1024, 862 P. 2d 423, 424 (1993)(rejecting collateral order doctrine because it would impose an undue burden on state supreme court): North Dakota: *State v. LaFontaine*, 293 N.W. 2d 426, 427 (N.D. 1980)(stressing that the North Dakota Supreme Court, unlike the Supreme Court of the United States, would itself have to hear any collateral order doctrine appeals); Ohio: *Celebreeze v. Netzley*, 554 N.E. 2d 1292, 1295, 51 Ohio St. 3d 89 (1990)("the federal collateral order doctrine . . . involves judicial construction of the federal final order statute and is thus not applicable to the states"); Rhode Island: *In re Joseph T.*, 575 A. 2d 985, 986 (R.I. 1990)(collateral order doctrine inconsistent with general state rule that appeals are limited to "a final judgment . . . that completely terminates the litigation"); Texas: *Permian Corp. v. W.R. Davis*, 610 S.W. 2d 236, 238 (Tex. Civ. App. 1980)(collateral order doctrine inconsistent with state rule that "only a final judgment is appealable"); Utah: *Merit Electrical & Instrumentation v. Utah Dept. of Commerce*, 902 P. 2d 151 (Utah App. 1995)(collateral order doctrine inconsistent with the intent of the state legislature): Virginia: *West v. Commonwealth*, 249 Va. 241, 243, 455 S.E. 2d 1, 2 (1995)(collateral order doctrine "inapposite because it involved the interpretation of a federal statute.").

[30]*E.g. Samuel v. Stevedoring Services of America*, 24 Cal. App. 4th 414, 418, 29 Cal. Rptr. 420, 422 (Ct. App. 1994)(state collateral order doctrine limited to orders that "direct the payment of money by appellant or the performance of an act by or against him"); *In re J.G.*, 627 A. 2d 362, 364 (Vt. 1993)(even when requirements of collateral order doctrine are met, decision whether to permit interlocutory appeal is a matter of discretion).

than the federal rule.

The mere fact that such state procedural provisions may differ from section 1291 does not raise a serious question under the Supremacy Clause. If that circumstance alone were sufficient to force Idaho to follow the standards of section 1291, all of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, and much of Title 28 of the United States Code, would have to be applied whenever any federal claim was litigated in state courts. If section 1291 applies where it benefits state court section 1983 defendants, that federal procedure would a fortiori be controlling where it favored the federal claimant. Idaho Appellate Rule 11 would presumptively be invalid under the Supremacy Clause, for example, insofar as it permits defendants to appeal from an order granting a new trial on qualified immunity, a right not accorded federal defendants, and insofar as it fails to permit civil rights plaintiffs to take an interlocutory appeal of a decision denying a preliminary injunction. See 28 U.S.C. §1292(a)(1). Similarly, if section 1291 jurisprudence governs a section 1983 claim in state court, those principles would surely apply as well to Idaho state criminal proceedings regarding federal constitutional claims. Thus under the interpretation of section 1291 in *Abney v. United States*, Idaho would have to permit an

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[31]*E.g. McGowan v. Our Savior's Lutheran Church*, 527 N.W. 2d 830, 832 (Minn. 1995)(state collateral order doctrine applies to any denial of a motion to dismiss alleging a lack of subject matter jurisdiction); *Goldston v. American Motors Corporation*, 392 S.E. 2d 735, 737, 326 N.C. 723, 727 (1990)(disqualification of counsel immediately appealable, notwithstanding *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985)); *Hanson v. Federal Signal Corporation*, 679 A. 2d 785 (Pa. Super. 1996)(denial of class certification appealable under state collateral order doctrine, notwithstanding *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978)).

interlocutory appeal to the Idaho Supreme Court whenever a state trial court denied a motion to dismiss under the Double Jeopardy Clause, even though such an appeal of right might not be required by the Double Jeopardy Clause itself.[32]

Given the structure of the Idaho court system, moreover, it is unclear exactly how section 1291 could in any event be applied to Idaho state courts. Section 1291 governs appeals to the intermediate federal appellate courts, the circuit courts of appeals. Petitioners contend that they should be accorded a right to "appellate review . . . in the appropriate state appellate court." (Pet. Br. i). But Idaho has no intermediate appellate courts between the state District Courts and the Idaho Supreme Court. The court to which any appeal from such a District Court would have to be taken, the Idaho Supreme Court, occupies under Idaho law the position atop the system of state courts that this Court occupies atop the system of federal courts. State District Courts, on the other hand, themselves serve as intermediate appellate courts to review appeals from decisions by the state's Magistrate Courts. If federal law were somehow to govern appeals of section 1983 cases to the Idaho Supreme Court, the appropriate federal law would appear to be, not section 1291, but the statutes governing the grant of writs of certiorari by this Court. 28 U.S.C. §§ 1254, 1257.

(3) Because the right to take certain interlocutory appeals in federal court regarding qualified immunity derives from section 1291, rather than section 1983, it necessarily follows that the failure of a state to provide interlocutory appeal procedures identical to section 1291 cannot be said to

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[32]Surprisingly, the Attorney General of Idaho, as counsel for petitioners, and the Attorneys General of thirty-six states, as amici, both appear to advance precisely that argument. (Pet. Br. 10; Brief of the Commonwealth of Kentucky, et al., as Amici Curiae, p. 12).

be inconsistent with section 1983, any more than this Court's decision in *Johnson v. Jones* could be described as "violating" section 1983. Nothing in the language of section 1983 purports to modify the jurisdiction of any state's appellate courts. The legislative history of section 1983 reveals no intent to modify then well known and established state procedures for resolving civil litigation:

> The defects Congress perceived in state courts lay in their jury factfinding processes, which of course were skewed by local prejudice, . . . and not in their otherwise neutral rules of procedure. . . . Congress saw no need to alter these neutral procedural rules.

Felder v. Casey, 487 U.S. at 148 n. 4.

Of course, if a state were to refuse to recognize in a section 1983 action the qualified immunity defense established by *Pierson v. Ray*, 386 U.S. 547 (1967), and its progeny, a different question would be presented. (See Part V, *infra*). Idaho, however, does recognize that defense[33], and the Idaho District Courts will entertain prior to trial a motion to dismiss, or for summary judgment, on qualified immunity grounds. In the instant case, the Idaho District Court for Bonner County fully and fairly considered petitioners' proffered arguments. Counsel for petitioners submitted substantial briefing on the legal and factual issues asserted by their proffered defense, and were permitted to present an extensive oral argument. Petitioners do not question the fairness of either the state District Court process or the state judge who rejected their motion.

Petitioners object, not that they were denied a forum in which to fairly present prior to trial their qualified immunity defense, but that they were not given *two* such

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[33]*Arzen v. State*, 123 Idaho 899, 854 P. 2d 242 (1993).

forums. But Idaho need not create a right to appeal in civil cases at all. *See M.L.B. v. S.L.J.*, ---U.S.---(1996), 1996 WL 716328, *6 (U.S.). If Idaho may choose not to give its appellate courts jurisdiction over appeals in civil cases, a fortiori the state can control the timing of those appeals that it does allow. "[I]nterlocutory orders are not appealable 'on the mere ground that they may be erroneous.'"[34] *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 (1981). Because trial court judges can generally be assumed to accurately interpret the law[35], limitations on appeals from their decisions do not render unenforceable the underlying

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[34]Petitioners argue that the denial of an interlocutory appeal will "provide a windfall for §1983 plaintiffs who are the beneficiaries of erroneous rulings denying qualified immunity motions." (Pet. Br. 28). Such errors, however, do not accord any benefit to section 1983 plaintiffs; to the contrary, plaintiffs will ordinarily be worse off for such errors, since the time and expense they subsequently devote to trial will be for naught if that defense is ultimately sustained on appeal following final judgment. The denial of an interlocutory appeal regarding qualified immunity only benefits section 1983 plaintiffs where that interlocutory appeal would have failed on the merits, but only after imposing on those plaintiffs the burden of additional delay and expense. Petitioners, however, do not assert that plaintiffs receive any improper windfall by being spared the burden of responding to *unsuccessful* interlocutory appeals.

[35]Surprisingly, Attorneys General from thirty-six states urge this Court to hold that state judges are unlikely to be able competently to determine when a particular federal constitutional right was clearly established. Brief of the Commonwealth of Kentucky, et al., as Amici Curiae, p. 15. Nothing in the Supremacy Clause, however, requires or authorizes this Court to assume such inadequacy on the part of the state judiciary. "[W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial . . . courts of the several States." *Stone v. Powell*, 428 U.S. 465, 494 n. 35 (1976).

rights or defenses involved. *Cf. Caterpillar, Inc. v. Lewis*, 65 USLW 4021, 4026 (1996).

The purpose behind Idaho Appellate Rule 11 does not conflict with section 1983. This is not a case, like *Felder v. Casey*, 487 U.S. 131 (1988), where the policy of Rule 11 is "manifestly inconsistent with the central objectives of the Reconstruction-Era civil rights statutes." 487 U.S. at 150, *quoting Burnett v. Grattan*, 468 U.S. 42, 54 (1984). To the contrary, the Idaho policy disfavoring interlocutory appeals has nothing to do with civil rights or claims against government officials; it is essentially the same neutral policy underlying section 1291--albeit with somewhat different contours--of avoiding the delays and burdens that so often follow from permitting interlocutory appeals.

Section 1983 contains on its face no express reference either to the qualified immunity accorded executive officials, or to the absolute immunities provided in certain circumstances to prosecutors, judges, and legislators. These immunities have been held to exist under section 1983 on the assumption that the Congress which first enacted that law meant to leave in place the common law immunities that existed in the nineteenth century. *Procunier v. Navarette*, 434 U.S. 555, 561 (1978); *Pierson v. Ray*, 386 U.S. 547, 561 (1967). But the general principle "that review of *nisi prius* proceedings [must] await their termination by final judgment" was also well established in the nineteenth century, having "derived from the common law and [been] enacted by the First Congress." *DiBella v. United States*, 369 U.S. 121, 124 (1962). This Court's interpretation of section 1291 in *Mitchell* did not suggest that the rule there announced had existed at common law, or was followed by any jurisdiction in 1871 when section 1983 was adopted. Indeed, in *Mitchell* the oldest decision the Solicitor General could identify which had permitted an interlocutory appeal

regarding qualified immunity had been handed down in 1982.[36] However well reasoned the collateral order doctrine in *Cohen* itself may be, it represented a significant modification of prevailing nineteenth century procedure.[37]

(4) Petitioners suggest that Rule 11 somehow "discriminates" against section 1983 actions. A state procedure can only fairly be described as discriminating against a federal cause of action where the state rule singles out federal claims, or a particular federal claim, for special disadvantageous treatment not imposed on claimants generally. In *Howlett v. Rose*, 496 U.S. 356 (1990), the Florida courts had held that state courts with general jurisdiction over all other tort claims could not hear section 1983 claims against local government bodies. This Court ruled that the state could not apply such a section 1983-specific bar to claimants who otherwise met "all the state-law procedures for invoking the jurisdiction of the court." 496 U.S. at 379. In *Felder v. Casey* Wisconsin required plaintiffs wishing to sue government officials--but not other potential defendants--to first file a special notice-of-claim; because no such prerequisite applied to tort actions against ordinary private defendants, the Court held that the statute "most emphatically does discriminate in a manner detrimental

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[36]Brief for Petitioner, *Mitchell v. Forsyth*, No. 84-335, pp. 17, 22 (*citing McSurely v. McClellan*, 697 F. 2d 309 (D.C.Cir. 1982)).

[37]15A Wright, Miller and Cooper, Federal Practice and Procedure, §3911, p. 332 and n. 6 (1992); 9 Moore's Federal Practice par. 110.10, p. 62 (1996)(*Cohen* "was a significant inroad on the historic federal policy against interlocutory appeals.")

to the federal right." 487 U.S. at 146.[38]

The principle underlying these cases is manifestly inapplicable to the instant case. Rule 11 does not single out for special treatment section 1983 actions, claims against government officials, or claims arising under federal law. To the contrary, the Idaho role against interlocutory appeals is a facially neutral general prohibition applied without regard to the subject matter of the claim, the law under which it arose, or the status of the defendants. To the extent that Rule 11 does create exceptions allowing certain types of interlocutory appeals, those exceptions are generally applicable to section 1983 actions, and can be invoked by plaintiffs and defendants alike. Thus the parties in a section 1983 action in state court--like all other civil litigants--may, for example, appeal from an order granting a new trial, a type of interlocutory appeal not available in federal court. Idaho Appellate Rule 11(a)(5). It is not correct to suggest, as petitioners do, that Idaho law permits interlocutory appeals from numerous other "collateral orders" (Pet. Br. 21); the decisions to which petitioners refer--from orders granting a new trial, suppressing evidence or reducing criminal charges--are not collateral orders under *Cohen* and cannot ordinarily be the subject of an interlocutory appeal in the federal courts.

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[38]In *McKnett v. St. Louis & S.F.R.Co.*, 292 U.S. 230 (1934), Alabama permitted suits in its courts arising from out-of-state events if the action arose under the laws of "another state", but not if the plaintiff alleged a federal cause of action. In invalidating that restriction, this Court explained that "the Federal Constitution prohibits courts of general jurisdiction from refusing to [enforce a federal claim] solely *because* the suit is brought under a federal law." 292 U.S. at 234 (Emphasis added).

IV. PREEMPTION IS UNWARRANTED BECAUSE THE INTERESTS PROTECTED BY THE QUALIFIED IMMUNITY DEFENSE ARE THE INTERESTS OF THE STATE ITSELF

Where state law does not permit interlocutory appeals by state officials regarding qualified immunity, there is no overriding *federal* interest that would justify compelling the states to entertain such appeals. State laws may be preempted if they would impose "major damage" to "clear and substantial interests" of the federal government. *United States v. Yazell*, 382 U.S. 341, 352 (1966). But the purpose of allowing interlocutory appeals from the denial of a state officials' qualified immunity claim in federal court is to protect *state*, not federal, interests. If a state has concluded that these state interests are not sufficient to justify affording state officials an interlocutory appeal, there is no reason to construe federal law to preempt state law.

Petitioners and their amici argue at length that the qualified immunity defense to a section 1983 action protects vital state interests. (Pet. Br. 11, 26). But the state of Idaho which adopted Rule 11 is the self-same state in whose interest petitioners ask the Court to invalidate that very Rule. The protections which qualified immunity accords to Idaho's state interests are not protections which Idaho is obligated to invoke. Clearly the Supremacy Clause would not be violated in a section 1983 action if the Attorney General of Idaho, as counsel for the defendants, declined--in federal or state court--to appeal an adverse decision regarding qualified immunity, or simply refused to assert that defense at all. Section 1983 was not enacted for the purpose of protecting state and local officials from civil rights lawsuits. Rather, the qualified immunity defense constitutes merely a limitation chosen by Congress on the lengths it was disposed to go to protect

federal constitutional rights. Such a limitation serves no federal interests, and thus cannot provide a basis for federal preemption.

Petitioners' argument ignores, as well, the vital interests that Idaho has in avoiding the inefficiencies that may be caused by interlocutory appeals. As this Court noted in *Johnson v. Jones*, interlocutory appeals can easily burden appellate courts with unnecessary appeals that would never have occurred had the litigation proceeded to final judgment. 115 S.Ct. at 2151.[39] In addition, "permitting piecemeal appeals would undermine the independence of the [trial] judge, as well as the special role that individual plays in our judicial system." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. at 374 (1981). Limiting interlocutory appeals is generally "crucial to the efficient administration of justice," *Flanagan v. United States*, 465 U.S. 259, 264 (1984), because such appeals are likely to involve "disruption, delay and expense." *Richardson-Merrell Inc., v. Koller*, 472 U.S. 424, 430 (1985).

In the absence of a successful interlocutory appeal, to be sure, the state or local officials named as defendants in a section 1983 action may have to devote some time and effort to discovery and trial. Permitting such an appeal, however, will consume a significant amount of time and effort by the five Justices of the Idaho Supreme Court. The defendants in a section 1983 action will almost always be officials whose time and responsibilities in state government are considerably less vital than those of the state Supreme Court. In the instant case, the focus of the litigation will be likely be the

[39]9 Moore's Federal Practice §3905, p. 238 (1996)("The courts of appeals are heavily burdened and must be able to avoid impositions on their jurisdictions, not only as a matter of self-interest but also to make the best use of the increasingly scarce resource of appellate capacity.")

testimony of the manager of a small state operated liquor store. Idaho could reasonably conclude that it is more important to spare the state Supreme Court from having to hear interlocutory appeals in cases such as this than to avoid inconveniencing the minor officials typically involved. That judgement is particularly reasonable because *all* such interlocutory appeals will require a diversion of time and effort in the Idaho Supreme Court[40], while only *some* interlocutory appeals--those in which the qualified immunity defense is sustained on appeal--will ultimately save any time or effort on the part of the defendant officials. Idaho also might laudably conclude that the state itself had an interest in vindicating--without the delays attendant to interlocutory appeals--the claims of Idaho citizens whose federal constitutional rights had been violated.

Reasonable people, to be sure, could differ regarding where a state's interests lie in this type of situation. But Idaho law entrusts the determination of the state's interests to the Idaho Supreme Court, which is authorized to promulgate the Idaho Appellate Rules, subject to such modification as the Idaho legislature chooses to enact. The Idaho Attorney General, as counsel for petitioners, evidently believes that the Idaho Supreme Court, by promulgating Rule 11, and the Idaho legislature, by failing to modify that Rule, have misapprehended the state's true interests. This case thus presents the somewhat unusual spectacle of a state Attorney General attacking the validity of his own state's Appellate Rules.

The Attorney General is free to advance to the Idaho

[40]Application of the federal collateral order doctrine would also require the Idaho Supreme court, in a case such as this, to devote resources to determining whether the denial of petitioners' motion was based on legal or evidentiary grounds. *See City of Lakewood v. Brace*, 919 P. 2d 231 (Colo. 1996).

Supreme Court or the state legislature his views on this issue, and either state institution is at liberty to amend Idaho Appellate Rule 11 to authorize precisely the sort of appeals sought in this case should they conclude that Idaho's interests would indeed best be served by such a procedure.[41] But if, despite the entreaties of the state Attorney General, neither the Idaho Supreme Court, the Idaho legislature, nor the voters of the state can be persuaded that Rule 11 should be amended to permit interlocutory appeals of denials of qualified immunity defenses, there is no reason why this Court should intervene in such an intra-state dispute. The competing interests at stake are the state's interest in limiting appeals to final judgments and the state's interest in protecting discretionary action by state officials through the qualified immunity doctrine. Where the state has concluded that these competing state interests do not justify an interlocutory appeal, there is no basis for federal preemption of state law.

The amicus brief filed in support of petitioners highlights the intra-state nature of this issue. In five states[42], statutes or court rules have been construed to preclude interlocutory appeals as of right regarding qualified immunity; the attorneys general of these states, rather than simply ask their own courts or state legislatures to modify the rules or statutes in question, have joined a brief in this Court asking that those state provisions be declared invalid under the Supremacy Clause. Attorneys General from a number of states which *do* permit interlocutory appeals as of right regarding qualified immunity ask this Court to hold that the

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[41]In 1989 the Texas legislature enacted just such a law in response to *Noyola v. Flores*, 740 S.W. 2d 493 (Tex. Ct. App. 1987). Texas Civil Practice and Remedies Code Ann. §51.014(5)(Vernon's 1996).

[42]California, Illinois, South Dakota, Ohio, and Washington.

procedure that already prevails in their states is constitutionally required. It is unclear why these amici would seek such a ruling other than to forestall the possibility that in the future the courts or legislatures in their states, despite the presumed arguments of the state attorneys general to the contrary, might conclude that their state's interests would be better served by avoiding such appeals.

V. A STATE MAY PROVIDE IN SECTION 1983 ACTIONS REMEDIES MORE FAVORABLE TO FEDERAL CLAIMANTS THAN WOULD EXIST IN FEDERAL COURT

Although a state may not discriminate against a federal cause of action, a state is generally free to provide special procedures for section 1983 cases where those procedures are more favorable to the underlying federal cause of action than would be the case in federal court, or even under the state's general procedural rules.

> States may make the litigation of federal rights as congenial as they see fit--not as a *quid pro quo* for compliance with other, uncongenial rules, but because such congeniality does not stand as an obstacle to the accomplishment of Congress' goals.

Felder v. Casey, 487 U.S. at 131.

Under the Supremacy Clause the controlling question is whether a state procedure or rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637,

651 (1971).[43] "[T]he central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Burnett v. Grattan*, 468 U.S. 42, 55 (1984).[44] Section 1983 provides "a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). A state statute or rule which provides to individuals "whose federal constitutional . . . rights are abridged" *greater* remedies than would be available in federal court, or to ordinary litigants in state court, obviously is not "an obstacle" to the enforcement of those federal rights.

That a state may provide for the enforcement of a federal cause of action procedures and remedies more favorable to the claimant than would be available in federal court is illustrated with particularity by this Court's decision in *St. Louis, B. & M. Ry. v. Taylor*, 266 U.S. 200 (1924). The plaintiff in that action had sued the defendant railroad in state court, invoking a federal statute which imposed strict liability on shippers for any damage caused by subsequent common carriers.[45] The action in question could not have

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[43]*Felder v. Casey*, 487 U.S. at 140 (issue is whether the state law will "significantly inhibit the ability *to bring* federal actions")(emphasis added); *Brown v. Western R. of Alabama*, 338 U.S. 294, 299 (1949)("[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon *rights of recovery* authorized by federal laws.")(emphasis added).

[44]*Felder v. Casey*, 487 U.S. at 141 ("the central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors")

[45]34 Stat. 584, c. 3591, §7, par. 11, 12.

been brought in federal court, because federal practice did not permit personal service on the railroad[46] and did not authorize the use of quasi in rem proceedings. Missouri law, however, did authorize quasi in rem proceedings, and the plaintiff filed just such an action in state court. The railroad moved to dismiss that state court action, arguing that the state courts could not provide a remedy in circumstances in which federal court would have been closed to the federal claim, and that the "defense" provided by federal procedure was "substantive."[47] This Court unanimously rejected that argument.

> Congress created the right of action. . . . The federal right is enforceable in state court whenever its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws. Under [Missouri] law, this jurisdiction may be exercised, to the extent of applying property attached to the satisfaction of a claim, even though personal service cannot be made upon the defendant. That remedy is one which was not available to the [plaintiff] in the federal court for Missouri. But this fact is not of legal significance . . . . The origin of the right does not affect the manner of administering the remedy.

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[46]Federal law only authorized service on a defendant which was an inhabitant of or could be found in the state in which the federal court was located. *Ex parte Railway Co.*, 103 U.S. 794 (1880). The defendant in *St. Louis Ry.* resided in Texas, and the action had been brought in the District Court for Missouri.

[47]Brief for Petitioner, No. 89, October Term 1924, pp. 6, 14, 17, 20, 22.

266 U.S. at 208.

The outcome urged by petitioners in the instant case is particularly inappropriate because Idaho is unquestionably free, if it wishes, to create its own civil rights action for violations of federal constitutional rights, and to provide that in that state action there will be no qualified immunity defense at all. The Congress which first enacted section 1983 did not intend to preclude the states themselves from providing remedies for violations of the Fourteenth Amendment--if indeed Congress could do such a thing under section 5 of the Fourteenth Amendment--but only to provide an alternative federal remedy because state methods of implementing that Amendment had proved inadequate. As this Court stressed in *Monroe v. Pape*, 365 U.S. 167, 183 (1961), "The federal remedy is supplementary to the state remedy . . . ." *See Patsy v. Board of Regents of State of Fla.*, 457 U.S. 504, 506-07 (1982). Representative Bingham, speaking on behalf of the measure that became section 1983, observed that "the States have concurrent power to enforce the Constitution of the United States." Cong. Globe, 42nd Cong., 1st Sess., App. 85 (1871).

Consistent with the purpose of section 1983, and with their responsibilities under the federal constitution, a number of states have enacted laws creating a state cause of action for violations of the federal constitution. The particular contours of section 1983 do not preclude states from providing in their own causes of action remedies more generous than may exist under federal law. In several states, for example, a defendant government official who acts with a "malicious purpose" has no qualified immunity, e.g. Fla. Stat. §768(9)(a)(1989), although the existence of such a purpose would not preclude a finding of qualified immunity in a section 1983 action. *Harlow v. Fitzgerald*, 457 U.S. 800, 813-20 (1982). Although under section 1983 local governments are subject to awards of compensatory damages

only on a showing that the injury complained of was the result of an official policy or custom, *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a number of states have authorized imposition of municipal liability for federal constitutional violations based solely on *respondeat superior*. *E.g. Moor v. County of Alameda*, 411 U.S. 693, 698 (1973).[48] Similarly, Idaho, in enacting its own cause of action for violations of the Fourteenth Amendment, clearly could fashion a form of qualified immunity significantly narrower than the immunity available in a section 1983 action, or provide no qualified immunity at all. That being so, it is difficult to understand why Idaho cannot take the considerably more modest step of merely deferring until final judgment any appeals regarding the particular form of qualified immunity recognized by federal law.

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[48]This Court expressly upheld the authority of the states to do so. 411 U.S. at 710 n. 27 ("Petitioners argue that merely because 'Congress [did] not intend, as a matter of federal law, to impose vicarious liability upon a public entity for violations of the Civil Rights Acts committed by the entity's employees,' it does not follow 'that Congress also intended to preclude a state from imposing such vicarious liability as a matter of state law.' Reply Brief for Petitioners 4-5. Certainly this is true.")

CONCLUSION

For the above reasons the order of the Idaho Supreme Court should be affirmed.

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